



In the Matter of)
Request for Review of the)
Decision of the)
Universal Service Administrator by) **CC Docket No. 02-6**
Cobb County School District,)
Marietta, Georgia)
Schools and Libraries Universal)
Service Support Mechanism)

**Request for Review of the Decision of the Universal Service Administrator
Of FCC Form 471 Application Number 600728, FRN 1693489
And FCC Form 471 Application Number 615126, FRN 1750040
And Request for Waiver in the Alternative**

I. INTRODUCTION

This appeal has been necessitated because the Universal Service Administrator has incorrectly interpreted the Federal Communications Commission (“FCC” or “Commission”) regulations and orders prescribing the E-rate¹ competitive bidding requirements. In engaging in this incorrect interpretation, the Administrator promulgated policy in violation of its limited charter and then further compounded these mistakes by applying this newly announced policy retroactively to the detriment of the Cobb County School District (“CCSD”, “District” or “Applicant”), SLD Entity Number 127276. Consequently, the District – the second largest in the state -- has been denied approval of funding for its broadband backbone network to connect its 114 schools and 13 administrative buildings to one another, as well as for its other landline telecommunications services. The District’s denials

¹ Schools and Libraries Universal Service Support Mechanism, 47 C.F.R. ¶54.500 *et seq.* (commonly referred to as “E-rate.”)

threaten the ability of the District to provide high quality educational services that incorporate technology in the classroom for its more than 106,000 students. All told, the District stands to lose more than \$2,200,000 in E-rate funding for FY 2008; an additional \$2,200,000 for FY 2009; and, yet a third allocation of \$2,200,000. The funding losses for FY 2009 and FY 2010 are due solely to the SLD's failure to timely transmit its FY 2008 denial decisions until November of 2009, which is well after the deadline for submitting FY 2009 applications; and merely less than 90 days before the Form 471 application deadline for FY 2010. In order to alleviate the purported wrong that SLD has accused the District of committing, the District would have to rebid the two major contracts in question – a process that requires far more than 90 days to undertake and complete.

The issue in this appeal stems from the manner in which CCSD evaluated the proposals received in response to two separate Requests for Proposals. The bid evaluation process was identical for the two procurements. While the District allocated the most points to the cost factor – so that price was weighted most heavily – the District conducted an initial evaluation round that resulted in the disqualification of two proposals because of deficiencies in those proposals. The SLD concluded that this process violated the E-rate competitive bidding requirements even though this process insured that price was weighted most heavily, complied with the *Ysleta* Order²; complied with the District's own award winning Purchasing Department's regulations; complied with the specific process delineated in the Request for Proposal documents and therefore put all bidders on notice of the evaluation process; and, was conducted with complete integrity and without any perceived impropriety that the FCC has found to taint other applicants' competitive bidding (such as improper service provider involvement).

Form 471 number 600728, FRN 1693489 requested funding for telecommunications services via a new multi-year contract. Form 471 number 615126, FRN 1750040 requested funding for regional wide area network lit fiber services to

² *Request for Review by Ysleta Independent School District of the Decision of the Universal Service Administrator*, CC Docket Nos. 96-45, 97-21, Order, 18 FCC Rcd 26406 (2003) (*Ysleta Order*).

interconnect the District's 114 schools also via a new multi-year contract. While both contracts provide vital communications services to the District, to make both voice and data telephony available, the regional wide area network lit fiber service is critical in order to be able to provide broadband Internet access services to the District's students and classrooms. Without E-rate funding to support this project, the District will be left with a huge unexpected budget gap that will undoubtedly adversely affect the delivery of educational services to its students. Further, the regional wide area network project is also important to the citizens in the county. The District is the largest employer in the county. The broadband facilities installed to serve the District can also be made available for delivering other broadband service to the citizens in the county.³

For all of these reasons, CCSD urges the FCC to promptly review and grant this appeal.

II. SLD REVIEW OF THESE APPLICATIONS

In February of 2008, CCSD timely submitted the two form 471 applications at issue in this appeal. The District responded to inquiries from the Program Integrity Analysis (PIA) staff of the Universal Service Administrator and also prepared a comprehensive response to a Selective Review request. The District provided all competitive bidding documents to the SLD, including the Requests for Proposals, the proposals submitted by bidders, and the bid evaluation documents in June of 2008.

Following this submission, the District received a follow-up inquiry about the evaluation factors and the manner in which the evaluation was conducted. The District submitted a comprehensive explanation in September of 2008.

³ In its National Broadband Plan Public Notice #15, DA 09-2376 (Public Notice released November 3, 2009), the FCC indicated that it would like the E-rate program to facilitate or stimulate the adoption of broadband more widely in communities and whether and how the E-rate program can be structured to more effectively distribute available funding.

The focus of the Selective Review zeroed in on the manner in which the District evaluated the bidders' proposals for the procurements at issue.

In both Requests for Proposal⁴, the District allocated the most points to the cost criterion, in accordance with the *Yseleta* Order. In the RWAN procurement, RFP 01-08, 45 of 100 points were allocated to price, and no other factor received a greater weighting. In the telecommunications service procurement, RFP 53-05, 100 of 200 points (50% weighting) were allocated to the price factor and no other criterion received a greater weighting.

Both Requests for Proposals required that at least 70% of the eligible points for the non-cost factors be awarded in order for the cost proposals to be considered and reviewed. In RFP 53-05, there were 100 possible points for non-cost factors, and bidders had to receive 70% or 70 points in order to advance to the cost proposal consideration.

In RFP 01-08, there were 65 possible points for non-cost factors, and bidders had to receive 70% or 49 points in order to advance to the cost proposal phase.

The SLD engaged in extensive review and consideration of the District's evaluation process, beginning with the Selective Review. Then in October of 2008, the District communicated with the Senior Manager of PIA, Leslie Fullwood, concerning the status of the application reviews. Ms. Fullwood informed the District via email dated October 15, 2008 that Cobb County School District's "competitive bidding process was not a multi-tier process and the FRN(s) will not be denied for this reason."⁵ (Emphasis added).

CCSD also participated in a HATS visit with USAC staff in October of 2008. This meeting included Catriona Ayer, Leslie Fullwood and John Noran of USAC as well as Chris Ragsdale, Melinda Salley, and Erika Adams from CCSD. At that time, the CCSD competitive bidding process was discussed related to the pending funding applications for 2008. During

⁴The RFP for telecommunications services, RFP 53-05, is attached as Exhibit A. The RFP for Regional Wide Area Network Service, RFP 01-08, is attached as Exhibit B.

⁵ Attached as Exhibit C.

this meeting, the USAC staff recommended that procurement processes should be modified for **future** E-rate eligible Bids and RFP's and CCSD's existing process would be acceptable for the applications and contracts in review at that time. CCSD agreed to these recommendations and has since then implemented procedural changes, recommended during the HATS visit, to be applied to all solicitations (Bids/RFPs) for future contracts and agreements for procurement of E-rate eligible goods and services.

In March of 2009, CCSD was notified by Robert Spiller, Ombudsman Manager for USAC, that letters would be sent to applicants who had not yet been funded outlining the reason. CCSD never received such a letter.⁶

CCSD also contacted the State E-Rate Coordinator for Georgia, Charlie Jackson, in July 2009 to request assistance in getting updates and information related to the status of the 2008 funding applications. In an email response from Mr. Jackson following his conversation with Ms. Ayer he provided the following information⁷:

Catriona did indeed call and inform me of the following: the issue at hand is quite complex as they thought that with you all utilizing the 70 point threshold for your application and the approval you received from USAC for this was all okay as an internal (USAC) agreement had been reached. Well the USAC lawyers overturned this decision and Catriona and her team are now working with USAC's attorneys to attempt to find a comfortable agreement. She assured me that they are working through the issue and hopefully they will find some common ground soon in order for Cobb to be funded.

(Emphasis added).

Finally, by letters dated November 11, 2009, the District received the funding commitment decisions letters in which the funding requests were denied for the official reason that:

The first round of your vendor selection process is not considered to be a disqualification round because the criteria used in that round were subjective and were scored, rather than being binary criteria. As a result, the first round of your vendor selection process is considered to be the first tier of a two tier vendor selection process. Price of the eligible goods and services was not a factor in your first tier. Consistent with procedures, price

⁶ Attached as Exhibit D.

⁷ Attached as Exhibit E.

of the eligible goods and services must be the primary factor in each tier of a multi-tier vendor selection process. Therefore, the FRN is denied.

The District accordingly is timely filing this appeal to challenge the Universal Service Administrator's decisions and will demonstrate the numerous flaws in the rationale for the funding denials in the following appeal.

III. THE UNIVERSAL SERVICE ADMINISTRATOR BASED ITS REVIEW OF THE DISTRICT'S FUNDING REQUESTS ON A NEW POLICY THAT EXCEEDED THE ADMINISTRATOR'S AUTHORITY, AND THEN IMPROPERLY APPLIED THE NEW POLICY RETROACTIVELY TO THE DISTRICT'S PENDING FUNDING REQUESTS.

A. The District's Bid Evaluation Complies With The *Yseleta* Order.

The *Yseleta* Order sets forth the FCC's most recent advice on competitive bidding and was the requirement in effect when the District conducted both of these procurements and selected the vendor for each service. *Yseleta* requires that price must be the primary factor in an E-rate competitive bidding evaluation. The District adhered to *Yseleta* when it developed the bid evaluation matrices for both procurements, which were set forth in the respective requests for proposals, and which illustrate that price was *the* primary factor in the evaluation and was given the most weight:

RFP 01-08 Bid Evaluation Matrix:

Factor	Weight
Technical/Service/Implementation Capabilities	35 points 35%
Business Stability(Vendor Q and A & References)	15 points or 15%
Value added	2 points or 2%
Organization and Completeness	3 points or 3%
Cost	45 points or 45%
Total	100%

RFP 53-05 Bid Evaluation Matrix:

Factor	Weight
Vendor Information	16 points or 8%
References and Past Performance	16 points or 8%
Warranty and Support Requirements RFP Section 4.2.01	16 points or 8%
Warranty and Support Requirements RFP Section 4.2.02	16 points or 8%
Warranty and Support Requirements RFP Section 4.2.03	16 points or 8%
Value Added	14 points or 7%
Organization of RFP	6 points or 3%
Cost	100 points or 50%
Total	100%

CCSD also clearly explained in the Requests for Proposal that in order for bidders to be qualify to have their cost proposals considered, the bidders had to score a certain number of points in the non-cost factors. This process was designed to insure that the bidders' substantive proposals *were viewed to be sufficiently responsive* to the specifications of the RFP in order to be viewed as a *plausible proposal*. If the merits of the proposal were judged to be insufficient, then the proposal is deemed non-responsive to the RFP and the cost proposal would not be considered at all.

During the RFP evaluation process the District carefully examined all RFP responses and assigned points based on the strength of the response when compared to the prescribed technical, financial and other criteria as specified in the RFP.

In the case of RFP 01-08, the responses from Cinergy and AT&T did not meet our District's technical/service/implementation criteria. The information provided in their responses was not sufficient to warrant further consideration. Their responses were deemed ***non-responsive*** based on the information provided by the vendors. (Please reference State/Local Procurement Compliance section of this document for the National Institute of Governmental Purchasing definition of non-responsive.) Sunesys was the most

cost-effective provider of the desired products or services eligible for support, with price as the primary factor.⁸

In the case of RFP 53-05, ITC Deltacom/Elite response did not provide a solution that adequately met our criteria. Again, the response was deemed non-responsive. (Please reference State/Local Procurement Compliance section of this document for the National Institute of Governmental Purchasing definition of non-responsive.) Bell South did meet the criteria of the RFP and was awarded 98 cost points for having the most cost effective solution. They received a total of 191 points and were awarded the contract. Southern Digital Networks /FDN did meet the criteria of the RFP and was awarded 95 cost points for having the second most cost effective solution. Their total was 173 points.⁹

This process is modeled after the District's purchasing regulations, which in turn are based on the National Institute of Government Purchasing, Inc.'s procurement guidelines. The National Institute of Governmental Purchasing, Inc. (NIGP) is a national, membership-based non-profit organization providing support to professionals in the public sector purchasing profession. NIGP provides its members with many services, including education, professional networking, research, and technical assistance. *See* <http://www.nigp.org/eweb/>. Indeed, NIGP publishes a Public Procurement Dictionary of Terms- Copyright 2007 by NIGP, Inc. which defines a non-responsive bid as "a response to a bid or offer that does not conform to the mandatory or essential requirements contained in the Invitation for bids." This is the definition that the District employed when it established the bid evaluation approach that was used for these two procurements.

This District has been recognized nationally as a model of excellence for government procurement.

⁸ The evaluation sheet for RFP 01-08 is attached as Exhibit F.

⁹ The evaluation sheet for RFP 53-05 is attached as Exhibit G.

- In 2003, 2006 & 2009, CCSD received the Outstanding Agency Accreditation Achievement Award (OA4) - 3rd consecutive three-year certification. See description at www.nigp.org/EWEB/legacy/OA4app3509.doc
- In 2005, 2006, 2007, 2008 & 2009, CCSD earned the Achievement of Excellence in Procurement (AEP). CCSD is only one of eight school districts across the country to receive this award. "The Achievement of Excellence in Procurement® (AEP) is awarded annually. This prestigious award is earned by those organizations that demonstrate excellence by obtaining a high score based on standardized criteria. The criteria are designed to measure innovation, professionalism, productivity, e-procurement, and leadership attributes of the procurement organization."
<http://www.nationalpurchasinginstitute.org/aep/index.asp>
- Pareto Accreditation earned in 2009: "The Pareto Award was named after Vilfredo Pareto, the founder of the 80-20 rule, and is the most prestigious and highest award of agency achievement in our profession. The Pareto Award may be earned only by agencies that have achieved OA4 accreditation and successfully completed a prescribed peer review process."
<http://www.nigp.org/eWeb/docs/GoPro/DecJan2010/AgencyAccred.pdf>
- 2004, The Pareto Award - One time award for agencies achieving the pinnacle in Procurement. CCSD's Procurement Services Department is the only educational entity to receive the Pareto Award.

Even a cursory review of the District's web site reveals the integrity with which this District conducts its procurements.

<http://www.cobbk12.org/centraloffice/Purchasing/index.htm>. The District publishes its purchasing regulations online so that the process is transparent to all interested stakeholders, and also publishes a Code of Ethics that it requires all members of each bid evaluation team to abide by, and requires each member to sign a written confirmation of

compliance. There can be no doubt that this District operates an extremely professional procurement approach that has written documented procedures that guide every step of each procurement and that are based on nationally recommended standards published by the National Institute of Governmental Purchasing.

The District's process also is supported by the Federal Acquisition Regulations' Two-Step Sealed Bidding Process set forth in Subpart 14.5. Section 14.501 describes the process as follows:

Two-step sealed bidding is a combination of competitive procedures designed to obtain the benefits of sealed bidding when adequate specifications are not available. An objective is to permit the development of a sufficiently descriptive and not unduly restrictive statement of the Government's requirements, including an adequate technical data package, so that subsequent acquisitions may be made by conventional sealed bidding. *This method is especially useful in acquisitions requiring technical proposals, particularly those for complex items.* It is conducted in two steps:

(a) Step one consists of the request for, submission, evaluation, and (if necessary) discussion of a technical proposal. No pricing is involved. The objective is to determine the acceptability of the supplies or services offered. As used in this context, the word "technical" has a broad connotation and includes, among other things, the engineering approach, special manufacturing processes, and special testing techniques. It is the proper step for clarification of questions relating to technical requirements. Conformity to the technical requirements is resolved in this step, but not responsibility as defined in 9.1.

(b) Step two involves the submission of sealed priced bids by those who submitted acceptable technical proposals in step one. Bids submitted in step two are evaluated and the awards made in accordance with Subparts 14.3 and 14.4.

48 C.F.R. §14.501. (Emphasis added). The Federal Acquisition Regulations contemplate that some procurements are so technically complex in nature that the merits of the bidders' proposals must be evaluated initially in order to determine whether the proposal is responsive to the specifications. If the proposal is not responsive, then the proposer's price is not considered since the proposal is not considered to be valid. Again, this process that is sanctioned by the Federal Acquisition Regulations as a legitimate method for conducting competitive bidding was used by the District.

The *Yseleta* Order made clear that E-rate competitive bidding requires price to be a separate evaluation factor and be weighted most heavily among all factors:

[We] clarify that that the proper reading of our rule, in light of the Commission's longstanding policy to ensure the provision of discounts on cost-effective services, is that price must be the primary factor in considering bids. Applicants may also take other factors into consideration, but in selecting the winning bid, price must be given more weight than any other single factor. When balancing the need for applicants to have flexibility to select the most cost-effective services and the limited resources of the program, we conclude that requiring price to be the single most important factor is a rational, reasonable, and justified requirement that will maximize the benefits of the E-rate discount mechanism, while limiting waste, fraud, and abuse.

Yseleta Order at ¶ 50.

CCSD's bid evaluation matrix was developed in order to comply with this directive by allocating the most points to price in the evaluation matrices for the procurements at issue.

The *Yseleta* Order also announced that a two phased bidding approach where the E-rate competitive bid selects a systems integrator company and then negotiates the specific prices for E-rate eligible services without first soliciting and evaluating the price of those bids is impermissible. This too the District did not do. The District required each bidder to submit a full and complete proposal including price in response to the RFPs. The District's RFPs itemized the specific services that the District sought to receive, and did not engage in any kind of over-expansive list of all eligible services and products as the applicants had done in the *Yseleta* case.

Nowhere in the *Yseleta* Order or any other FCC E-rate competitive bidding order and regulations that were in effect in December of 2005, when the District issued RFP 53-05 or later in September of 2007 when the District issued RFP 01-08, is there any indication that the consideration of whether a proposal is non-responsive, and therefore, disqualified, must be based on "binary criteria" yet this is the crux of the SLD's denial rationale.

B. The SLD Improperly Established A Prohibition Against Using A Scored Evaluation To Disqualify Vendors' Proposals After The District Conducted Its Procurements And Then Retroactively Applied The New Prohibition To Deny the District's Funding Requests.

The funding denial rationale was created arbitrarily, unsupported by any FCC precedent or regulations, and reflected a new policy that was applied to the District after the procurements had been conducted.

There is ample case law to support the premise that the competitive bidding rules in effect at the time when a bid is conducted are to be used to judge whether the procurement satisfied E-rate requirements.

In Request for Review by Colegio Nuestra Senora del Carmen Hatillo of the Decision of the Universal Service Administrator, et al., File Nos. SLD-359532, 359494, et al., CC Docket No. 02-6, DA 08-2387 (Order Released October 30, 2008), the FCC found that the rules governing competitive bidding that were in place when an applicant developed and issued its Request for Proposal should be used to evaluate an applicant's compliance with the E-rate competitive bidding requirements. In that situation, the FCC had issued the *Yseleta* Order after the Applicant in Colegio Nuestra had initiated its vendor selection process. The Schools and Libraries Division denied the funding to Colegio Nuestra because they did not follow the *Yseleta* ruling. The FCC reversed, finding that the standards in place prior to the *Yseleta* ruling should govern whether the Applicant satisfied the competitive bidding requirements. Likewise, in *Request for Review by Academia Discipulos de Cristo Bayaman, et al.*, File Nos. SLD-358081, 358083, et al., CC Docket No. 02-6, DA 06-1642 (Order Released August 15, 2006), the FCC had incorrectly applied *Yseleta* retroactively.

See also *Request for Review by Long Beach Unified School District of the Decision of the Universal Service Administrator*, File No. SLD-367394, CC Docket No. 02-6, DA 07-2695 (Order Released June 20, 2007) in which the FCC stated, "As discussed below, we find that the Petitioner complied with the Commission's competitive bidding requirements in place at the time of its application." *Id.* at ¶1 (emphasis added); *Request for Review by Friendship*

In all of these cited cases, the FCC agreed that those applicants that had followed the explicitly prescribed requirement *in effect at the time that the procurements were conducted* –that price had to be a primary factor ***but not the*** primary factor in a bid evaluation should be permitted to be funded, since it was impossible for those applicants to have known about the forthcoming clarification in the *Yseleta* Order.

CCSD should be afforded the same right to rely on the then published guidance on competitive bidding when the District undertook these procurements. As explained in Section III. A. above, the District believes that its procurement process complied with the *Yseleta* Order. Assuming, *arguendo*, that the Commission disagrees, then the District should not be subjected to retroactive application of the new *binary criteria for disqualification* rule because this restriction was not in place when the District conducted the procurements at issue.

In December 2005 when RFP 53-05 was issued, and in September 2007 when RFP 01-08 was issued, the SLD's then applicable training advice regarding competitive bidding evaluations simply reiterated the "price as the primary factor" requirement of *Yseleta*. In its "Program Compliance" training presentation in the fall of 2005, the SLD provided the following advice:

Competitive Bidding

- Selecting the winning bidder
 - Price must be the primary factor, considering only ELIGIBLE goods and services.
 - Solution must be cost-effective (not just *the most* cost-effective)
- May not use E-rate to subsidize the procurement of ineligible or unrequested products or services because that constitutes a rebate of the non-discount portion of the costs, which is a violation of FCC rules.

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Applicants were taught that they were permitted to impose restrictions on bidders, and were permitted to disqualify bidders as long as the bidders were informed in advance of the potential reasons for disqualification:

Imposing restrictions

- Applicants can set some requirements for bidders.
 - For example, applicants may require service providers to provide services that are compatible with one kind of system over another (e.g. Apple vs Windows) or compatible with one kind of hardware (e.g. Cisco switches).
- Applicants must be prepared to explain if/how they disqualified bids.
- Applicants must inform all bidders of any requirements that could lead to disqualification.

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In RFP 53-05, issued in December of 2005, the District complied with all of these requirements. The District made sure that price was the most heavily weighted evaluation factor and also disclosed in the RFP that if bidders did not obtain a score of 70% of the non-cost points, then the bidders were considered non-responsive and disqualified from further consideration. Further, the bid evaluation sheet clearly denotes the reasons why certain bids were disqualified.

In the fall of 2007, when the District developed RFP 01-08, the District relied on the training information that the SLD had posted in the fall of 2006 for FY 2007, which was the most recent information available when the District drafted the RFP. The SLD's advice was identical to the fall 2005 training materials.

Apparently, however, the fall 2007 training materials for the first time mentioned that a multi-round selection process must rely on price as the primary factor in each stage; however, there was no mention of the ability of applicants to disqualify a vendor¹⁰:

¹⁰ The concept that multi-round bid evaluations would only be valid if the price of E-rate eligible services was most heavily weighted in each evaluation round was not announced on the SLD web site in its competitive bidding section (<http://www.universalservice.org/sl/applicants/step04/construct-evaluation.aspx>) until in December 2008. Before then, there was no mention of any specific requirements governing multi-round bid evaluations. Indeed, this new policy was first announced in Selective Review information requests circulated in connection with FY 2008 Form 471 applications. Obviously, without adequate advance notice prior to conducting its procurements in the fall of 2008, CCSD was unable to comply with this newly announced SLD policy.

Vendor Selection

- Keep documentation of your selection process
- Create your selection matrix and follow it
- If using a multi-round selection process, price of the eligible goods and services must be the primary factor in every round.
- USAC template available!

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www.usac.org

In none of these materials is there any mention that the disqualification of vendors must be accomplished through the use of *binary criteria*. This newly articulated standard was never-before published or shared with applicants. The District relied in good faith on the SLD training information¹¹ and concluded that as long as it explained the method of evaluating proposals, and that the proposals that did not receive sufficient points on the merits would be disqualified from consideration. Nowhere in the FCC's Orders or SLD guidance was there any claim that vendors' disqualifications were not permitted to be based solely on non-cost factors.

Only in the fall of 2009, well after the District's procurements had been completed and its FY 2008 and FY 2009 form 471 applications were submitted and pending, the SLD's training information clearly articulated the new *binary criteria* standard for disqualification of vendors, and their unilateral conclusion that unless binary criteria were used, the

¹¹ The District's personnel who are responsible for E-rate filings attend the annual SLD annual training sessions. The materials that SLD distributes and discusses at training sessions are voluminous. The SLD should not be announcing new policy on training slides, since, as discussed hereinafter, the SLD lacks the regulatory authority to make new policy.

disqualification round was considered a multi-tier evaluation that had to rely on price as the primary factor:



Disqualifying Bidders

- Qualifications/disqualification factors must be spelled out to all interested parties
- Available to all in Form 470 and/or RFP
- Disqualification factors are binary (eg yes/no) and cannot be scored on a range
 - Otherwise, this is multi-round evaluation and price must be primary in **every** round
- Retain documentation of notice and review

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There is no legal basis, however, for the SLD to articulate new policy advice. The FCC regulations governing the Universal Service Administrator make clear that the Administrator is explicitly prohibited from setting policy:

The Administrator may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress. Where the Act or the Commission's rules are unclear, or do not address a particular situation, the Administrator shall seek guidance from the Commission.

47 C.F.R. §54.702 (c). The SLD was unauthorized to announce a new policy and then apply that policy retroactively to deny the District's FY 2008 applications.

The numerous communications between the District and SLD officials in Washington, D.C. that pre-dated the District's receipt of the funding denial letters vividly illustrate the fact that these funding applications raised an issue of first impression that was not addressed in existing FCC orders and regulations.

First, as noted in Section II above, In October of 2008 in response to District inquiries concerning the status of the SLD's review of its applications, CCSD received

written confirmation via email on October 15, 2008 from Leslie Fullwood, Senior Manager of PIO at USAC, that Cobb County School District's "***competitive bidding process was not a multi-tier process and the FRN(s) will not be denied for this reason***". (Emphasis added).¹²

Based on this reassurance from SLD's senior staff in Washington, D.C., the District did not initiate a new procurement for either of the contracted-for services that were included in the then pending FY 2008 applications and relied on these same contractual agreements in submitting its FY 2009 funding applications. The timing of this communication was critical in the District's deliberations as to how to move forward with its FY 2009 applications while the two FY 2008 funding requests had still not been decided.

CCSD also participated in a site visit under the Helping Applications to Succeed ("HATS") with USAC staff in October of 2008. This meeting included Catriona Ayer, Leslie Fullwood and John Noran of USAC as well as Chris Ragsdale, Melinda Salley, and Erika Adams from CCSD. At that time, the CCSD competitive bidding process was discussed related to the then pending funding applications for 2008. During this meeting, the USAC staff recommended that procurement processes should be modified for **future** E-rate procurements and CCSD's existing process would be acceptable for the applications and contracts in review at that time. CCSD agreed to these recommendations and has since then implemented procedural changes, recommended during the HATS visit, to be applied to all solicitations (Bids/RFP's) for future contracts and agreements e-Rate eligible goods and services.

In response to additional status inquiries initiated by the District, in March of 2009, Robert Spiller, Ombudsman Manager for USAC, notified the District that letters would be sent to applicants who had not yet been funded outlining the reason.¹³ CCSD never received such a letter.

¹² See Exhibit C.

¹³ This email is attached as Exhibit I.

Then on May 11, 2009, in response to District inquiries, Catriona Ayer, Senior Director of PIA, informed the District that the bidding evaluation issue had not yet been resolved, despite Ms. Fullwood's earlier email:

We are still discussing the qualification round internally and hope to have this resolved in the next month.

The District's representative responded, and reminded Ms. Ayer that during the October 2008 HATS visit, the District was informed that the issue had been resolved and provided copies of related earlier email correspondence. Ms. Ayer responded, stating:

Yes, I remember. However, the issue came back up again [and] is on the table for discussion.

(Emphasis added).¹⁴

Then two months later, CCSD learned from the State E-rate Coordinator that although there had been consensus among the USAC staff that the District's bid evaluation process did comply with the E-rate competitive bidding rules, the USAC lawyers disagreed with the staff's position and the attorneys and staff were trying to work through the issue in a satisfactory manner that would approve the District's funding requests.¹⁵

These communications clearly display the uncertainty and ambiguity of the SLD's position regarding the propriety of the District's funding requests – precisely because the FCC Orders and regulations do *not* address the precise bid evaluation method that the District legitimately utilized. While the SLD-USAC senior staff concluded that the District had complied with the competitive bidding rules, the legal staff of USAC disagreed with this position and evidently their position prevailed, and the funding denials were issued in November of 2009.

The situation becomes a multiple year catastrophe if the SLD's decision is permitted to stand, since the District's pending FY 2009 applications for the two contract services that

¹⁴ The email messages are attached as Exhibit H.

¹⁵ See Exhibit E..

were denied in FY 2008 rely on the same contracts that the SLD did not accept, which inevitably will lead to denials in FY 2009.

Had a formal funding decision been reached by USAC and communicated to CCSD in a timely manner following the HATS visit, rather than waiting until more than one year later and after an additional year's funding application cycle had been concluded, to deny the funding requests in contradiction of the earlier statements from October 2008, at the very least, CCSD could have "limited the damage" to FY 2008 and could have effectively re-bid the existing contracts in question for FY 2009.

Since the contracts related to the RFPs and funding applications in question were multi-year contracts, and CCSD was advised that the existing process was acceptable, and a formal decision was delayed over a year from the time of the HATS visit, CCSD will be adversely affected with funding denials for at least an additional year (FY 2009) unless the FCC reverses the SLD's decision.

CCSD maintains, based on the information provide in this Request for Review as well as in previous meetings and communication with USAC, that it was in compliance with E-rate program rules related to competitive bidding at the time the RFPs were written, contracts executed and e-Rate forms were filed and this appeal should be granted.

IV. THE FCC SHOULD WAIVE THE COMPETITIVE BIDDING RULES AND GRANT RELIEF TO THE DISTRICT.

Should the Commission conclude that the SLD properly applied FCC rules and precedents in evaluating the District's compliance with the competitive bidding rules, the District urges the FCC to apply this ruling prospectively and permit the District's procurements to be upheld. Both its local and long distance service and its regional wide area network service already have been installed and are subject to multi-year contracts

that involve significant termination charges for early termination. As a far less desirable and feasible approach, the District in the alternative requests the Commission to allow the District to re-bid the contracts at issue and re-apply for FY 2008 and FY 2009 funding. This relief is warranted under the unique circumstances of this case. The District acted in good faith and tried to comply with the competitive bidding rules. There is no sign of waste, fraud, abuse or other wrongdoing on the part of the District. To the contrary, the District operates an award winning procurement department. Last, the District's competitive bidding process that the FCC may conclude was defective had not previously been the subject of an FCC Order or SLD guidance.

As the Commission explained in its *Yseleta* Order, in approving the affected applicants' ability to re-bid the tainted procurements:

A rule may be waived where the particular facts make strict compliance inconsistent with the public interest. In addition, the Commission may take into account considerations of hardship, equity, or effective implementation of overall policy on an individual basis. In sum, a waiver is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule.

Yseleta at ¶ 68. (Footnotes omitted). The FCC was persuaded by the fact that the SLD had previously approved the same types of procurements that were disapproved in later years and which were the subject of the appeal. Similarly, the SLD had permitted applicants to rely on very broadly worded Form 470s in prior years although it disapproved of this practice and denied associated funding in later years. In other words, applicants may have relied on past SLD approvals to proceed with its applications using the same procedures that were later disapproved by the SLD. Also, the FCC recognized that its past rules and decisions did not address the circumstances presented in the *Yseleta* appeal:

73. We recognize that in certain instances, our rules and past decisions did not expressly address the circumstances presented here. That, however, does not preclude a finding that there has been a violation of our competitive bidding rules. In considering how to remedy this violation, we seek to enforce our rules to prevent waste, fraud and abuse, while also considering factors of hardship, fairness, and equity. For the

reasons described below, we find that waiver of our rules to permit applicants to rebid services in accordance with the terms below is in the public interest in light of the uncertain application of our rules to the novel situation presented, and the substantial and widespread reliance on prior SLD approval.

74. The Commission has previously granted a waiver of its rules where one factor that it took into account was confusion caused by the application of a new rule. We anticipate that we will rarely find good cause to grant a waiver of our rules based on confusion among applicants in applying them. We think that it is appropriate to consider this factor with regard to the instant appeals, however, as they involve the application of our rules to a unique situation, namely the two-step System Integration approach and related practices. The exercise of our discretion to grant such a waiver in this instance is also informed by the extent to which applicants relied upon the fact that other applicants that utilized this approach previously were approved for funding. We have previously considered an applicant's good faith reliance in deciding whether to grant a waiver of our rules. Here, we think that such consideration is appropriate because enforcement of these rules in these circumstances would impose an unfair hardship on these applicants. Accordingly, in light of all these factors, we find that it is in the public interest to grant a waiver of our rules in the novel situation posed by the instant case.

Yseleta Order at ¶¶ 73, 74 (Footnotes omitted).

All of these reasons apply in the current proceeding. First, the Applicant's procurement policy has been in effect and governed prior E-rate procurements which were approved without objection. Second, the District acted at all times in good faith and earnestly tried to comply with E-rate requirements. Third, this case is one of first impression in that the SLD and FCC had not previously addressed this kind of bid evaluation process. Fourth, the financial hardship that the District would endure if these denials were permitted to be upheld would certainly not be in the public interest and would interfere with the District's ability to provide excellent education to its more than 106,000 students. For these reasons, the District respectfully requests, in the alternative, that the FCC grant a waiver of the competitive bidding requirements and uphold the E-rate eligibility of these contracted-for services. As a last option, the FCC should allow the District to re-bid the two contracts at issue and to re-apply for funding for FY 2008, FY 2009 and FY 2010 for these services.

V. CONCLUSION

The Cobb County School District respectfully requests the Federal Communications Commission to grant relief consistent with this Request for Review or Request for Waiver in the Alternative.

Respectfully submitted,

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